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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

76-180 J. HENRY SMITH, *etc. et al.*,
Appellants-Defendants,
against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *etc. et al.*,
Appellees.

76-183 BERNARD SHAPIRO, *etc. et al.*,
Appellants-Defendants,
against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *etc. et al.*,
Appellees.

76-5193 NAOMI RODRIGUEZ, *etc. et al.*,
Appellants-Intervenors,
against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *etc. et al.*,
Appellees.

76-5200 DANIELLE and ERIC GANDY, *etc. et al.*,
Appellants-Plaintiffs,
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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *etc. et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR STATE APPELLANTS

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Opinions Below

The opinion of the three-judge District Court for the
Southern District of New York in *Organization of Foster*

Families For Equality and Reform, et al. v. Dumpson, et al. granting declaratory and injunctive relief (Appellants' Joint Appendix to Jurisdictional Statements, [hereinafter "A.J.S."] at 1a-20a), dated March 29, 1976, is reported at 418 F. Supp. 277. The opinion of United States District Judge Robert L. Carter dated March 22, 1976, granting motions to certify classes of foster children, natural parents and foster parents (A.J.S. 42a-50a) is not reported.

Jurisdiction

The final Order and Judgment appealed from was entered in the District Court on April 14, 1976 (A.J.S. 36a-38a). The notice of appeal to this Court was filed in the District Court on June 10, 1976 (A.J.S. 39a-41a), the jurisdictional statement was filed August 9, 1976, and probable jurisdiction was noted by this Court on October 12, 1976.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Statutes and Regulation Involved

Sections 383(2) and 400 of the New York Social Services Law, McKinney's Consolidated Laws of New York Annotated, Vol. 52A (1976) and Title 18 New York Codes Rules and Regulations § 450.10, Vol. 18(B) are reproduced at A.J.S. 51a-53a.

Questions Presented

1. Did the District Court err in finding that foster children in New York are subjected to "peremptory" transfers which result in a "grievous loss", and that foster children have a constitutionally cognizable "liberty" interest in their relationship to a particular set of foster parents who provide them with temporary care pursuant to contract rather than an adoptive home?

2. Did the District Court err in requiring an automatic hearing in virtually every case where a foster child who has been in a particular foster home for more than one year is to be transferred back to his natural parents, to another foster home, or to an adoptive home, in light of existing statutory procedures which fairly protect the interests of the child?

Statement of the Case

A. Appellants-Defendants Shapiro and Lavine respectfully incorporate herein by reference the Statement of the Case as set forth in the Brief for Appellants Naomi Rodriguez et al.

B. Present New York Foster Care Procedures

New York has long been recognized as a leader in the development of foster care services.* See, e.g., A. Kadushin, *CHILD WELFARE SERVICES* (2nd Ed.; New York, Macmillan Publishing Co., Inc., 1974) at 395. Today New York premises its foster care system on the accepted principle that the placement of a child into foster care is solely a temporary, transitional action intended to lead to the future reunion of the child with his natural parent or parents, or if such a reunion is not possible, to legal adoption and the establishment of a new permanent home for the child. In a 1976 amendment to the New York Social Services Law the New York Legislature reaffirmed the policy of New York's foster care system in the following terms:

"1. Statement of legislative findings and intent.

* The Child Welfare League of America defines "foster care" as "[a] child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period and when adoption is neither desirable nor possible." Child Welfare League of America, *STANDARDS FOR FOSTER FAMILY CARE* (New York, 1959) at 5.

(a) The legislature hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and

(iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

(b) The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. The legislature further finds that provision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such unnecessary stays.

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption."

New York Social Services Law* § 384-b, L. 1976, ch. 666, § 3 (R.A.).**

These goals reflect the paramountcy which New York law has always accorded to the preservation of biological families as its highest priority and to the provision of another permanent home for a child unable to continue to reside with his natural parents. *In the Matter of Jewish Child Care Association of New York [Sanders]*, 5 N.Y. 2d 222 (1959) (purpose of foster care is to prepare child for return to natural parents).

Thus, it is neither intended nor desired that foster care placement become permanent for a child entering the foster care system. See, e.g., N.Y. Soc. Serv. Law § 440(1), L. 1976, ch. 668. Foster parents must be licensed by the State, N.Y. Soc. Serv. Law § 375, either directly, N.Y. Soc. Serv. Law § 377, or indirectly through a state-authorized private foster care agency ("agency"),*** N.Y. Soc. Serv. Law § 376. Foster parents provide foster care services pursuant to a contractual agreement with the placing-out agency. N.Y. Soc. Serv. Law § 374(1-a). A child in foster care remains at all times in the legal custody of the agency or social services department ("department") accepting responsibility for him, as a result of several different kinds of placements. He may be placed voluntarily by his parents**** (N.Y. Soc. Serv. Law § 384-a [R.A.]); or time-limited custody may be granted to the Commissioner of

* Hereinafter "N.Y. Soc. Serv. Law."

** "R.A." indicates that the cited statutory provision is reproduced in the separate Appendix to Brief for Appellants Naomi Rodriguez *et al.*

*** The participation of private social welfare agencies as an important element of the New York foster care system dates back over a century to the New York Children's Aid Society, which initiated the first foster family care placements. Kadushin, *CHILD WELFARE SERVICES*, *supra*, at 395-6.

**** Voluntary placements comprise approximately 80% of all entries into the foster care system. Deposition of Dr. David Fanshel, Record Docket Number 93, p. 79.

Social Services by order of a judge of the Family Court (Articles 7 and 10 of Family Court Act); or permanent custody and guardianship of children may be granted to the Commissioner by order of a judge of the Family Court or the Surrogate pursuant to Soc. Serv. Law §§ 384, 384-b (R.A.). The standard contract executed by a foster parent upon accepting the placement of a child in his care confirms the right of the agency or department placing out the child to recall him "upon request". A.J.S. 8a; N.Y. Soc. Serv. Law § 383(2).

Under current New York law, the agency or department with custody of a foster child may remove the child from a foster home into which it has placed him by giving the foster parents 10 days written notice of such a removal, N.Y. Soc. Serv. Law § 384-a(2) (R.A.); except where an emergency requires immediate removal, 18 New York Codes Rules and Regulations* § 450.10(a). Upon receipt of such written notice, the foster parents may obtain a conference with an official of the department authorizing the removal. At that conference the foster parents may appear with an attorney, have the proposed action reviewed, be advised of the reasons for the action, and have an opportunity to submit reasons why the child should not be removed. *Ibid.*

The foster parents' request for a conference automatically stays the child's removal. The conference must be scheduled within 10 days of the foster parents' request, and the department's official must make a decision following the conference and issue it in writing within five days after the conference. Removal may not occur until at least three days after notice of the decision is sent to the foster parents. 18 N.Y.C.R.R. § 450.10(b)-(d). The foster parents are then entitled to appeal to the New York State Department of Social Services, and obtain a fair hearing on the removal decision. N.Y. Soc. Serv. Law § 400; 18 N.Y.C.R.R. § 450.10(c). A written determination must be rendered by the fair hearing officer within 30 days of the hearing. N.Y. Soc. Serv. Law § 400. There

* Hereinafter "N.Y.C.R.R."

is no statutory prohibition to removal of the child during the pendency of the disposition of the fair hearing.

Foster parents have other statutory rights under New York Law. Section 392 of the New York Social Services Law creates a foster care review proceeding in the New York Family Court in relation to any child who has remained in foster care for a continuous period of eighteen months. N.Y. Soc. Serv. Law § 392(2) (R.A.). The agency or department with custody of the child must file a review petition at that time, N.Y. Soc. Serv. Law § 392(2)(a), and foster parents may file such a petition at any time thereafter, N.Y. Soc. Serv. Law § 392(2)(c). In this proceeding, the court must enter an order embodying one of four dispositional alternatives for the child: (1) directing continuation of foster care, (2) directing return of the child to his natural parent, guardian or relative, (3) directing the agency to institute a proceeding to free the child for adoption, and permitting the foster parents in some circumstances to institute such a proceeding if the agency fails to act within 90 days, or (4) if the child is already free for adoption, directing that the child be placed for adoption with the foster parents or any other person. N.Y. Soc. Serv. Law § 392(7), as amended by L.1976, ch. 666, § 5. The sole criterion for this decision is "the best interest of the child." *Id.* In addition, foster parents are entitled after twenty-four months of continuous care of a child to intervene as a matter of right in any proceeding involving the custody of the child. N.Y. Soc. Serv. Law §§ 383(3) (R.A.), 384(3).*

* New York City provides an additional administrative procedure for foster parents. See Appendix C to Jurisdictional Statement of Appellants Smith *et al.*, p. A8 *et seq.* They may obtain a pre-removal "independent review" hearing on the record before a disinterested social services official, at which they may have counsel and present witnesses and evidence, cross-examine adverse witnesses, and have access to relevant agency files. A written decision, supported by reasons, must be issued within five days. Such hearings are not provided when a child is returned to his natural parents.

New York's scheme for the protection of children in foster care also imposes upon the natural parents stringent requirements for maintaining contacts with the children during the period of their foster care. These standards seek to insure that a child will not be returned to his natural parents unless the parents have maintained a constant and continuous regimen of visiting with the child in foster care. Section 384-b(5) of the Social Services Law provides that parental rights may be terminated upon a finding of abandonment by the parent if:

"(a) . . . such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

(b) The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child. In making such determination, the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in paragraph (a) of this subdivision."

Section 384-b(7)(b) states:

"For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact."

These new sections supplement and expand Section 611 of the Family Court Act, which also provides that a child can be declared permanently neglected if parents do not maintain substantial contact with him while he is in foster care. (R.A.).

In *Bennett v. Jeffreys*, 40 N.Y. 2d 543 (1976),* the New York Court of Appeals expressed the current balance of interests reflected in the procedures for custodial disposition authorized by New York law:

"Recently enacted statute law, applicable to related areas of child custody such as adoption and permanent neglect proceedings, has explicitly required the courts to base custody decisions solely upon the best interest of the child. . . . Under these statutes, there is no presumption that the best interest of the child will be promoted by any particular custodial disposition." *Id.* at 547.

While emphasizing the crucial element of the child's best interest, the Court rejected any right of third parties to compel continuation of a custodial relationship:

"Particularly rejected is the notion, if that it be, that third-party custodians may acquire some sort of squatter's rights in another's child. Third-party custodians acquire 'rights'—really the opportunity to be heard—only derivatively by virtue of the child's best interests being considered, a consideration which arises only after, as the cases have always held, the parent's rights and responsibilities have been displaced." *Id.* at 552, n.2.

* *Bennett* did not involve a formal foster care situation; the child had been separated from her mother for eight years, and was living with a former schoolmate of the child's grandmother. The Court's discussion, however, set out extensively New York's law concerning the best interests of the child.

Summary of Argument

The majority of the three-judge District Court held that a child's transfer from a foster home in which he has been living, "be it to another foster home or to the natural parents who initially placed him in foster care" (A.J.S. 10a) constituted a "grievous loss" *Ibid.* The court then concluded that it was conferring a benefit or "right" on foster children by requiring that temporary foster care be prolonged—and return home delayed—during the course of an administrative adversary hearing which may be attended by judicial review and appeals.

The assumptions upon which this ruling was predicated were totally unsupported by the record. There was no evidence of capricious movements or arbitrary transfers of foster children, nor the slightest proof that the agencies charged with responsibility for supervision of such children do not compile sufficient data to make informed professional judgments. Moreover, the theory that return to the child's natural parents, transfer to a more suitable foster family, or removal to an adoptive home is a "grievous loss" was refuted by the only empirical study introduced into evidence; this longitudinal study of 624 children in foster care showed the durability of the children and the lack of a statistically significant correlation between number of placements and successful adjustments.

Equally erroneous was the District Court's statement that pre-removal hearings would not "impede the right of biological parents to regain custody of their children" (A.J.S. 11a) and that such hearings are "compatible with" the State's *parens patriae* role. (A.J.S. 12a). Natural parents, who would be compelled to litigate in order to secure return of their own child and then await the outcome of the administrative hearing and judicial review, would obviously suffer a serious and unwarranted burden. The State would be compelled to act as the instrument of

separating parents and children rather than reuniting families—hardly a proper exercise of its *parens patriae* function. In addition, the fiscal and administrative cost to New York of holding as many as several thousand hearings every year and of maintaining the children in the foster home pending the fair hearing decision, is clearly substantial.

Finally, there is no source in state law or in the Constitution for the court's finding that foster children have a "liberty" interest in their relationship to a particular set of foster parents who provide them with temporary care pursuant to contract rather than an adoptive home. Cf. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *Meachum v. Fano*, 427 U.S. —, 96 S.Ct. 2532 (1976); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Even assuming *arguendo* the existence of such an interest, the court erred in requiring an automatic pre-removal hearing each time a child is transferred from a foster home in which he has resided for twelve months. New York presently provides, *inter alia*, a full judicial hearing which can be invoked by foster parents after a child has been in foster care for eighteen months. The rights of foster children are enhanced far more by New York's statutory scheme, which seeks to effectuate reunion with the family or adoption, than by the adversary hearings and attenuation of temporary foster care contemplated by the court below.

POINT I

The automatic hearings mandated by the court below do not accord a beneficial right to children but rather create an unnecessary and harmful burden on children and natural parents.

A. The District Court's finding that removal from a foster home is a "grievous loss"

The majority decision below held that a child's transfer from a foster home in which he has been living, "be it to another foster home or to the natural parents who initially placed him in foster care," constituted a "grievous loss."^{*} The court then concluded that it was conferring a benefit or "right" on foster children by requiring that temporary foster care be prolonged—and return home delayed—during the course of an administrative adversary hearing which may be attended by judicial review and appeals. This decision, which represents a judicial choice among competing social science theories, was arrived at with virtually no data base and no analysis.

The finding that a departure from a foster home is a "grievous loss" cognizable under the Constitution must be predicated on more than mere assumption. The District Court refused to recognize that the "loss" associated with such a move is a necessary component of the child's successful adjustment to a permanent home with his own parents or adoptive parents. As Professor Henry Grunebaum of the Harvard Medical School testified (A. 260a): "[Separation from foster parents] . . . entails a period of re-

^{*} Appellants' Joint Appendix to Jurisdictional Statement (hereinafter "A.J.S."), at 10a.

It should be noted that such hearings would also prevent adoption of the child, yet many foster parents do not wish to adopt the foster child even after he has become free for adoption. Appendix in the Supreme Court of the United States (hereinafter "A."), at 289a, 299a.

adjustment to the natural mother, and I believe that loss and that separation is probably better for the child to go through." Further, there is no evidence in the record that the parents, adoptive parents, or new foster parents to whom children are transferred are indifferent or unable to provide a happy and loving home. Indeed, the court cited no evidence in support of its constitutional holding, relying solely on a comment that "on the basis of our common past" separation from a familiar environment creates a "trauma."^{*} The majority below also failed to consider any possible trauma resulting from the child's further separation from his natural parents.^{**}

Appellees relied heavily on J. Goldstein, A. Freud, and A. Solnit, *BEYOND THE BEST INTERESTS OF THE CHILD* (Free Press, 1973) (hereinafter "Goldstein"), in contending that there must be a prior hearing each time a child in foster care for more than one year is removed, because continuity of the foster care relationship must be the dominant concern to those with the best interests of the child at heart. The Goldstein text espouses the doctrine that when a biological parent ceases to provide primary care for a child and is replaced for a period of time (varying according to

^{*} A.J.S. 11a.

^{**} Nor did the Court discuss the detriment to a child which could result from further maintenance in an unsuitable foster home. That children are more likely to be moved too slowly rather than too quickly from a foster home is documented in Point I(B) below. As Dr. David Fanshel, a witness for appellants, testified (A. 168a-169a).

"Professionals in the field have recognized that most people cannot be parents to all children. They have certain proclivities. Some children bring out the best in them, some provoke them. Some do it on the basis of their age; when they become more inquiring

" . . . So that the placement must be viewed as an experiment in living. And it demands that the agency pay close attention as to what's going on, because if they mismatch, as has occurred, the child will pay the consequences for that."

the age of the child from two to perhaps 18 months) by any other parent-like figure (e.g., a foster parent), then the biological family comes to an end and the child becomes a member of a new "psychological family". This theory is at variance with the protection accorded to the biological family both by New York and by this Court. *In the Matter of Jewish Child Care Association of New York [Sanders]*, *supra*; *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465 (1953) (natural mother who gave child up for adoption for two week period allowed to regain custody absent showing of unfitness); *Spence-Chapin Adoption Service v. Polk*, 29 N.Y.2d 196 (1971) (natural mother allowed to regain custody of child from foster parents); *Stanley v. Illinois*, 405 U.S. 645 (1972) (father of illegitimate child may not be presumptively denied parental rights); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state ban on teaching of foreign languages in private schools invalidated); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state requirement of compulsory public education invalidated); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (state law permitting sterilization of habitual criminals invalidated).

The thesis of the Goldstein book is that "[u]nlike adults, who are generally capable of maintaining positive emotional ties with a number of different individuals, unrelated or even hostile to each other, children lack the capacity to do so. They will freely love more than one adult only if the individuals in question feel positively to one another" (p. 12).^{*} By implication, the foster child would either (1) love only the foster parents instead of his own parents; or (2) care only for his natural parents and not for his foster parents. Situation (2), as noted above, was not considered by the court at all when it decreed automatic pre-removal hearings.

^{*} The Goldstein book goes so far as to suggest that the "custodial" parent should be able to exclude the "nonecustodial" parent from visiting the child altogether (p. 38).

The exclusive feeling for foster parents postulated in situation (1) is unlikely to occur; placement in foster care does not mean that a child's feelings towards his natural parents are no longer of much significance. Appellees' own witness at trial, Dr. Marie Friedman, acknowledged in response to a question about whether attachment to a foster parent cancels out attachment to the natural parent:

"No. One doesn't cancel the other out. And I think characteristic of the problems that exist with not only foster care children, any child who has lost a parent early in life, is that there is a sort of universal search for the lost parent. Idealized though it may be, it goes on and on. Children can have very adequate adjustments to life with the absence of a parent, whether it is replaced by a foster parent or not, and continue to have that yearning, longing search for the original parent." (A. 270a-271a).^{*}

The "best interests" of the child cannot be separated from the interests of his natural parents as easily as the proponents of the "psychological family" doctrine would assert. As Professor Henry Grunebaum testified: "[E]xperience in family psychiatry and work in family psychiatry and family therapy leads to the conclusion that while it is very important for children to be cared for and needed by their parents, it is very important for children to feel that there are things that they can do for their parents and that their parents need them; . . . and

^{*} The same point was made by Dr. David Fanshel (A. 175a-176a): "[T]here's been this whole phenomenon in the adoption field of the quest of grownup people for their forebearers. So that I see as a primary relationship the biological tie. I don't invest that with some mystique. . . . I don't take the view that the primary relationship has been improved if there has been total failure of the child-caring personnel. I do take the view though, all things being equal, that the [primary] relationship is the most significant one potentially, and it is the obligation of agencies to support that relationship."

children will feel very guilty in adult life if they have some feeling that they have left a parent in the lurch in one way or another when that parent needed them. So it seems to me from the child's point of view, it is important that one takes the parent's point of view into account and vice versa." (A. 256a-257a).

The methodology of the Goldstein book has incurred serious criticism. See, e.g., "Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action," by D. Katkin, B. Bullington and M. Levine, *Law and Society Review* 669 (Summer, 1974), which cites the book as "an example of the wrong way to employ social science to solve problems of social policy" (p. 669). The critique points out the lack of a thorough data base, the confusion between causality and correlation, and the failure to examine the question of "whether separation per se is harmful to children, or whether it is the relative deprivation that often follows separation that is destructive" (at p. 674).*

The record in the court below does contain objectively derived data on the effect of multiple placements of children; however, this data supports appellants, not appellees. Dr. David Fanshel, Professor of Social Work at the Columbia University School of Social Work, testified extensively concerning his longitudinal study of 624 children who were followed for five years after their entrance into foster care in 1966. (A. 159a-160a). Three teams participated, one focusing on the parents, one on the agencies, and one on the adjustment of the children. Psychologists tested the children 90 days after arrival in care, 2½ years later, and after five years, including among other analyses the contrasts between the children remain-

* Dr. Fanshel noted that the Goldstein book worked "back to the problems of the child deductively from general principles, without any reference to sampling, [the] representativeness of cases, to the general population of children in foster care" (A. 181a-182a). See also Professor Grunebaum, A. 255a.

ing in care and those who had returned home. Teachers described the adjustment of school age children, and social workers who knew the children also evaluated them according to numerous criteria.* Early developmental histories were included in the equation, so that personality disturbances at the start of foster care could be taken into account. The length of time the children spent in care, the number of placements and the degree of contact with parents were all examined. (A. 170a-171a).

Dr. Fanshel found that this extensive data failed to support the theory that after a year in one setting, removal would create a trauma. He found no proof that such a transfer would pose a "hazard of a pathogenic process taking place which is so overwhelming a hazard, that one should approve . . . the earlier transient [foster care] relationship." (A. 173a-174a). Instead, the objective evidence showed the durability of the children and the lack of a statistically significant correlation between number of placements and successful adjustment.

B. The District Court's holding that automatic hearings do not "impede" the rights of natural parents and are "compatible with" the interest of the State

The decision of the majority below asserts that pre-removal hearings would not "impede the right of biological parents to regain custody of their children." (A.J.S. 11a). The substantial and heartbreaking delay which would be created by such automatic hearings and their judicial aftermath are not even mentioned. Yet, two parties in this action have experienced such delay resulting from a custody contest. Litigation concerning return of two of the Wallace children to their natural mother commenced in June of 1974 and was not concluded until April,

* Dr. Fanshel had also analyzed a master tape of the Child Welfare Service concerning the reasons for placement of 23,000 children. (Deposition in the District Court, Record Docket Number 93, p. 12.)

1976, when the New York Court of Appeals dismissed an appeal from the decision of the Appellate Division affirming the decision to return the two girls to her immediately. *State ex rel. Wallace v. Lhotan*, 39 N.Y. 2d 705 (1976). Another example is intervenor-appellant Naomi Rodriguez, who asked for return of her child in February, 1973. The agency caring for the child rejected the request, and the subsequent litigation lasted from October, 1974 until June, 1976, when the Appellate Division ordered the child's return to her. *Matter of Rodriguez v. Dumpson*, 52 A.D. 2d 299 (1st Dept. 1976).*

Since such delays can occur even under current procedures, the requirement of automatic hearings before each removal would substantially increase the probability of such occurrences. The necessity for natural parents to litigate in order to secure return of their own child after a voluntary placement is in itself a serious and unwarranted burden.

The District Court held further that the interest of the State, as *parens patriae*, is "compatible with, rather than antagonistic to, the requirement of a hearing." (A.J.S. 12a). No reference is made to the primary purpose of foster care, which is to reunite families. See *Ramos v. Montgomery*, 313 F.Supp. 1179 (S.D. Cal. 1970), *aff'd mem.* 400 U.S. 1003 (1971). This purpose is parallel to the Congressional purpose set out in Title XX of the Social Security Act, 42 U.S.C. § 1397 *et seq.*, which provides funds to the State for programs including foster care services. If the Constitution were interpreted to regard the child as having ceased to be a member of his biological family after only a few months or a year with a new family, reunion of that child with his natural parents would become a mean-

* See also § 392(2)(c) of the Social Services Law, § 651 of the Family Court Act (R.A.) and *Matter of Mack*, 81 Misc. 2d 802, 367 N.Y.S. 2d 644 (Fam. Ct., 1975), which all provide a basis for a stay of removal of a child from a foster home.

ingless, unattainable goal. The effect of the decision below is to compel the State to act as the instrument of separating parents and children—a role hardly "compatible with" its *parens patriae* function.

The State's interest in a viable foster care system would also suffer serious impairment as a consequence of the decision below. If foster care presents a risk of delay, litigation and the possible permanent loss of the child, mothers will obviously be reluctant to use it. Parents will instead be increasingly likely to seek temporary and less satisfactory solutions outside of the formal foster care system. (A. 163a).

Moreover, the fact that custody hearings would be automatic and inevitable with the transfer decision depending on the information produced at the hearing, poses the risk that foster parents would use their influence over the child who is in their home to induce him to express a "preference" for them rather than for his natural parents. Whether the child's statement changes the outcome of the hearing or not, the goal of the foster care system would be undermined if foster parents attempted to interfere with the child's relationship to his mother and father. Foster parents have contractual and moral obligations to support and enhance the child's relationship to his natural parents.

The cost of implementing the District Court's due process scheme was also ignored in the decision below.* First, the annual fiscal burden to New York of holding thousands of foster care hearings, complete with hearing officers, court reporters, clerical and administrative support personnel, as well as disinterested adult representatives for the children, is clearly quite substantial. The foster care hearings now provided under New York law (pursuant to

* This Court indicated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), that fiscal factors may be considered in determining the appropriateness of a procedure under the Due Process Clause.

N.Y. Soc. Serv. Law § 400) typically are longer and more complex than other welfare-related administrative hearings, taking at least one full day. (A. 141a-142a). The cost of such hearings is correspondingly higher as well. As to the number of automatic hearings which would be required, almost 5,000 children were discharged from the New York foster care system in the first three months of 1976 alone. See New York State Department of Social Services, SOCIAL STATISTICS, Vol. XXXVIII No. 4 (April, 1976) at 8. If only one-half that number had resided in a foster family home for more than one year, these discharges would produce a potential for 10,000 automatic hearings every year. Transfers from one foster home to another—the annual number does not appear in the record—would result in yet more hearings.

But the cost does not end there. Since the foster child remains in the foster home pending the fair hearing decision, the foster parents remain eligible to receive their monthly stipend of at least \$155.* If the foster parents seek judicial review of an adverse decision and obtain a stay of the child's removal pending appeal, they will continue to receive the contractual amount for many months or even years. Even where no judicial review is sought, the normal time-lag before the rendering of a careful, complete decision after the court-ordered hearing is likely to be 30-60 days, during which foster parents will receive payments which cannot be recouped.

The combined cost of holding thousands of hearings each year, and of continuing to pay for prolonged foster care, would create a severe strain on New York's social services budget. The result would inevitably be the reduction of needed services.

* For example, foster parents contracting with the Louise Wise Agency are paid \$155.00 a month for caring for children under five, \$165.00 a month for children over five, still more for handicapped and retarded children. If multiple children are placed in one home, full multiple amounts are paid. This income is non-taxable. (Transcript of Record in the District Court [hereinafter "Tr."] Docket Item No. 84, pp. 87-89).

Thus, the District Court has misconceived the effect of its ruling. In choosing to substitute its policies for those of the New York Legislature, the majority below has contravened this Court's direction in *Labine v. Vincent*, 401 U.S. 532, 538-539 (1971) that it must be the legislature and not the federal judiciary which fashions rules to "establish, protect, and strengthen family life. . . ."

C. The District Court's ruling that hearings are necessary to prevent peremptory transfers and capricious movement of children

The decision below, in the process of justifying its hearing requirement, refers to peremptory transfers and the capricious movement of children from foster homes (A.J.S. 10a-11a) as though such arbitrary conduct were shown in the record. In fact, the record demonstrates the care, thought and extensive planning which characterizes transfers from foster homes. As pointed out by dissenting Judge Pollack, "No evidence has shown that the present procedures are conducive to or have resulted in hasty or ill-advised separations from the viewpoint of the foster child." (A.J.S. 30a).

The 10-day notice which is sent to the foster parents when a removal of the child is to be effectuated is only a small part of the process. The notice merely sets the date of final placement; the transfer, however, takes place over a much longer period of time. As Florence Creech, Executive Director of the Louise Wise Agency, and also a consultant for the Child Welfare League of America, testified (A. 276a-277a):

"This is always a very slow process, depending, of course, on the age of the child. Even a small child who speaks, a toddler, will be very much involved. The foster parents will know what we are planning, unless there should be a sudden emergency that is beyond our control, but when this is something we are planning, the foster parents would know, the natural

parents would know, the child is told, we never just take a child and just move that child.*

"It is done slowly, with the child having the opportunity of getting acquainted with the people where he is going, and I am putting it that way because where he is going might be back to his own family, might be to an adoptive home, might be to another foster home. But it would be a slow process, with the new adults becoming acquainted with the child, with the child visiting in the home, perhaps for an overnight visit. How much contact there would be, how slow it would be would depend on the age of the child, where the child is psychologically, what is best for him."

The child is consulted, and the older the child the greater the weight given to his wishes. (A. 279a). The foster parents are told the name of a person familiar with the case who can answer any questions, and can also talk to the agency director. The reasons are discussed prior to the sending of the notice (A. 281a-282a).**

* See for example 18 N.Y.C.R.R. § 606.16 (effective August 31, 1976) (R.A.) which provides:

"Discharge service plan. (a) When it is determined that within the next six months, a child is to be returned to relatives, placed for adoption, helped to make arrangements for independent living, or discharged to an agency which will be responsible for his continued care, a discharge service plan shall be developed. The plan shall clearly state to whom the child is to be discharged, where responsibility for the child will lie, what services are to be provided prior to and following discharge and how they are to be provided.

(b) Implementation of the discharge service plan begins prior to the time of discharge with interviews with the child, his family, and other individuals or agencies involved in the plan to identify possible problems, evaluate the readiness of all parties to participate in the plan, and arrange for the services identified..."

Local social services departments are given up to two additional years for full implementation of the regulation.

** Although the foster parents do not have direct access to agency files, no specific information is withheld from them. It is particularly important to provide to them all psychiatric evaluations of the child (A. 282a-283a).

And, as Jane Edwards, Executive Director of the Spence-Chapin Agency (which cares for 1,300 children) testified, foster parents are told the reasons for the transfer (A. 287a), and no move is planned except as a team decision of child care professionals. (A. 289a). Most children go home to their natural parents or to an adoptive home. (A. 288a).

If an error is made, it is not in the direction of peremptory moves. As Dr. Fanshel testified after studying hundreds of transfers of foster children over a lengthy period of time. (A. 176a, Deposition, Rec. Doc. No. 93, pp. 70-71):

"No, as a matter of fact, to be critical of the agencies, it is that we would be more often likely to allow a child to remain in a situation because under the pressure of high caseloads, the pressure of inadequate supply of foster homes, it's simply easier to let Johnny stay there than to find a new home and to go through the whole hassle of replacement. So that if I were to look for error, the error would be overwhelmingly in the direction of permitting the child to stay in a home where there was question about the performance of the foster mother.

"In other words, it takes mobilization of agency effort to replace a child, which would only be called for under the most dire circumstances."

D. The District Court's holding that the agency which has custody of the foster child needs "an organized forum in which to gather information"

While making no examination of the harmful effect which the automatic hearings it decreed would have on the children, the parents and the State, the majority of the Court below also devoted little analysis to any possible purpose which such hearings might serve. It simply stated that the agency would gain "an organized forum in which to gather information concerning, *inter alia*, the frequency with which the biological parent has been visiting his or

her child." (A.J.S. 12a). This statement overlooks the extensive regulations already requiring the compilation of facts concerning the relationship of the child to its own parents and to the foster parents.

The agency is required to visit the child in foster care, to maintain planned and regular contacts with the natural parents, and to supervise all major decisions in the child's life. Pursuant to New York Social Services Law § 372, 18 New York Codes Rules and Regulations ("N.Y.C.R.R.") § 450 *et seq.* and pursuant to customary social work practice, agencies maintain detailed case records with respect to the children and the natural parents, as well as the foster parents.* Indeed, appellees' witness Dr. Marie Friedman acknowledged that the agencies have "information beyond what anyone needs to make any kind of a decision. . . ."** Clearly, lack of information is not a problem.

Visiting by the parents, the single example cited by the court, is very strictly supervised by the agencies. (A. 275a). Such visits are planned and scheduled in advance and generally take place at the agency office. As has been set out in detail at pp. 8-9 *supra*, standards for visiting—and even for the quality of such contacts—are established by statute and failure to meet such standards is a basis for termination of parental rights. Family Court Act, § 611; N.Y. Soc. Serv. Law § 384-b(1)(b).

Thus, the social work team which makes transfer decisions already has access to the parties permitted to par-

* See 18 N.Y.C.R.R. § 606.15(b) (1976) which requires that the agency provide counseling of parents and children (within first two weeks of placement); conduct interviews with the child every two weeks and counseling with the family at least every two weeks (during first three months of placement); conduct visits with child and family at least monthly (during fourth through twelfth month); maintain monthly contacts with child and family (following first year of placement).

** Tr. 17.

participate in the hearing which would be required by the decision below, and can develop all the necessary information through the interview and observation process commonly utilized in professional child care. As described by Judge Pollack in his dissenting opinion below, this approach is based "on the disinterested . . . judgment of professional social workers acting under the aegis of well-conceived tried and tested statutes." (A.J.S. 30a). However, the order entered by the majority discards this process, and requires the State to formalize the inquiry by introduction of testimony before a hearing examiner.

The vagueness of the "best interests" test is particularly apparent when there is an attempt to judicialize the procedure for making the decision. If a child is healthy and doing well at school while in a foster home, does that mean that he would do as well in the parental home? Better? Would he be less well adjusted? Could enough personnel be made available to provide extensive psychological examination before each automatic hearing, to answer these questions and to provide psychiatric testimony on which findings could be made?

At such a hearing, the natural parents would be at a substantial disadvantage in making a presentation because of their lack of financial resources.* Yet, as the Court noted in *Bennett v. Jeffreys*, 40 N. Y. 2d 543, 549 (1976), there is an inherent inequity in custody disputes where one side "may not have the means to retain their own experts and where publicly compensated experts or experts compensated by only one side have uncurbed leave to express opinions which may be subjective or are not narrowly controlled by the underlying facts."

The "organized forum" hailed by the decision below is not needed as a fact-gathering mechanism. As noted in

* Foster care is not generally resorted to except by those who cannot afford to make private child care arrangements. (A. 163a).

the dissent, under the present system in New York, "judgments [are] reasonably reached by concerned independent disinterested agencies and professionals by less starchy methods." (A.J.S. 31a). These judgments are based on evaluation of a complex of individual factors, rather than simply a "checklist" of criteria. To graft automatic hearings and judicial review onto this system would be to ignore the limitations of the adversarial process and the deleterious effect it would produce on all the participants.

POINT II

Current New York foster care transfer procedures provide adequate protection to the rights of foster children under the Due Process Clause of the United States Constitution.

A. The District Court's finding that the Due Process Clause precludes returning a child to his parents or transferring him to a more suitable foster home without an administrative hearing

This Court has repeatedly held that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property". *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Meachum v. Fano*, 427 U.S. —, 96 S.Ct. 2532 (1976). A constitutionally cognizable liberty interest can either find "its roots in state law", *Meachum v. Fano*, *supra*, 96 S.Ct. at 2539 or "originate in the Constitution." *Ibid.*

In this case, neither of those sources creates a protectible interest on the part of a child in the preservation of his live-in relationship to a particular set of foster parents who provide him with temporary care pursuant to contract rather than an adoptive home. The District Court majority thus erred in imposing upon New York's foster care system a hearing requirement wholly at odds with the purpose and design of that system.

Appellees raised no claim below that New York law gives a foster child a cognizable liberty interest in the foster care transfer situation.* Rather, they sought to assert a right under the Constitution superior to New York law. That right was to be grounded, appellees contended, in judicial acceptance of the psychoanalytical concept of the "psychological family." Yet this doctrine is simply one of several competing theories as to the quality and depth of attachments formed in foster care, and appellees offered only the anecdotal recollections of their selected psychiatric witnesses to support it. As shown above, the only empirical evidence in the record, the study conducted by Dr. David Fanshel, demonstrates that number of placements has no significant relation to adjustment. In simplest terms, appellees never proved their case.

Thus, it would be singularly inappropriate for the Federal judiciary to invalidate the state provisions herein simply for being "incompatible with some particular economic or social philosophy", *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 42-43 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974); *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156 (1973). This Court has expressed its reluctance "to disallow the States to experiment further

* As noted previously, New York law unequivocally holds to the contrary. See pp. 3-8, *supra*.

and to seek in new and different ways the elusive answers to the problems of the young" *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (jury trial not constitutionally mandated in state court juvenile delinquency proceedings). That preference bears special weight in the difficult, multi-faceted circumstances presented in foster care.

Insofar as the decision of the District Court majority is predicated upon a finding of a "grievous loss", it misconstrued the constitutional dimension of that concept. This Court has unequivocally rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause". *Meachum v. Fano*, *supra*, 96 S. Ct. at 2538 (emphasis in original). In *Meachum*, the Court held that a prisoner was not entitled to a hearing or other due process protections prior to his transfer from one institution in the state prison system to another, even where the transfer produced a substantial adverse impact on the individual. *Ibid.* *Meachum* is dissimilar from the instant case in that the liberty of an incarcerated person to choose his own place of residence is curtailed as the result of a conviction. However, its rationale sheds light on the scope of protected liberty interests generally. It was held that no procedural protections were necessary in that context because transfers "often involve no more than informed predictions as to what would best serve . . . the safety and welfare" of the persons involved. *Ibid.* This Court therefore declined to require procedural protections which "would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of . . . administrators rather than of the federal courts." *Ibid.*

Moreover, while in *Meachum* the Court recognized the danger that at least some prison transfers might be effected for punitive purposes, in the foster care situation

no such danger exists. There is no occasion in which the relationship of the agency to the child is adverse or self-interested. Rather, the sole reason for every transfer is the agency's determination, based on its experience and expertise, of what would best serve the safety and welfare of the child. In the case of a return home, this determination is also based on the express request of the child's parent. Cf. *Meachum*, *supra*, 96 S. Ct. at 2538. The absence of antagonism between the agency and the child sharply distinguishes the foster care transfer situation from the usual context in which this Court has found cognizable Fourteenth Amendment interests. Cf. *Goldberg v. Kelly*, *supra*; *Bell v. Burson*, *supra*; *Morrissey v. Brewer*, *supra*; *Wolff v. McDonnell*, *supra*; *Board of Regents v. Roth*, *supra*. Even more than in the teacher-student classroom relationship, the foster child-agency relationship presents the opposite of a "typical 'conflict of interest.' Rather, the relationship traditionally is marked by a coincidence of interests". *Goss v. Lopez*, 419 U.S. 565, 594, n. 13 (1975) (POWELL, J., dissenting) (right to informal hearing prior to suspension from school).

This Court "long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults", *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. —, 96 S. Ct. 2831, 2843 (1976) (state statute conditioning abortion by minor on parental consent invalidated), and that it may in some situations impose upon children restrictions that would be "constitutionally intolerable for adults", *Ginsberg v. New York*, 390 U.S. 629, 650 (1968) (STEWART, J., concurring in the result) (State ban on sale of sexually-oriented literature to minors upheld), even in so paramount an area as the First Amendment. *Ibid.*; *Tinker v. Des Moines School District*, 393 U.S. 503, 514-15 (1969) (STEWART, J., concurring); *Prince v. Massachusetts*, 321 U.S. 158, 167-68

(1944) (state ban on employment of minors upheld on *parens patriae* grounds).*

Our society provides that the care of a child should be at all times committed to a responsible adult who has ultimate decision-making authority for the child. An adult guardian is necessary because children are "not possessed of . . . full capacity for individual choice." *Ginsberg v. New York*, *supra*, at 649-650 (STEWART, J., concurring in the result). Due process rights have been accorded to children faced with possible detention by the State, *In Re Gault*, 387 U.S. 1 (1967), where the detention could strip the child's parents of control over decisions concerning his well-being. But *cf. McKeiver v. Pennsylvania*, *supra*. However, this Court has never accorded a child any due process rights as against the decision-making authority of his own parent or legal guardian. The fact that the child's parents have temporarily given legal custody of the child to an agency which is an instrumentality of the State should not lessen the traditional reliance on the parental representative to exercise responsibility for his well-being.

An agency charged with supervision of a child in its custody operates under the aegis of two separate and distinct sources of authority. It not only has the power recognized by this Court to exercise control over the foster child in the *parens patriae* role, *Prince v. Massachusetts*, *supra*, but also acts under the authority conferred upon it by the express consent of the child's natural parents. See N.Y.

* Procedural safeguards afforded adults in many different contexts are simply inappropriate and unjustified for children. "[T]he experience of mankind, as well as the long history of our law, recogniz[es] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." *Goss*, *supra*, at 590-91 (POWELL, J., dissenting) (emphasis in original).

Soc. Serv. Law § 384-a (R.A.). It is in this latter capacity, as well as in its *parens patriae* function, that the agency determines the most desirable foster residence for the children in its care.

This Court has observed that it is the nature of the interest under consideration which determines if constitutional protection is appropriate. See *Board of Regents v. Roth*, *supra* at 571; *Morrissey v. Brewer*, *supra* at 481; *Fuentes v. Shevin*, 407 U.S. 67 (1972). If the interest involved here—that of a foster child in his residential relationship to a particular set of foster parents—deserves constitutional recognition, then that interest must be protected regardless of whether the child is to be returned home, placed in another foster home or placed with adoptive parents. Inexorably, to accord this "interest" constitutional status would result in conferring upon the child a constitutional right to choose not to return home to his own parents. The District Court's denial of an intention to disturb New York's strongly held policy of preserving and strengthening the natural family (A.J.S. 11a) is scarcely reassuring, for the inevitable effect of its ruling, if upheld by this Court, would be to alter fundamentally that social choice. If the child has a right not to live with his parents he would acquire other rights as well—a right not to attend the school chosen for him by his parents, or a right not to undergo surgical treatment at a municipal hospital arranged by his parents. The child would also be entitled to participate in all custody proceedings between his parents, and in all divorce proceedings (contested or uncontested) between the parents. Such parents would not be able to act on behalf of their children, and since the children could not be required to safeguard their own interests, appointed counsel would step in to exercise this function. It is difficult to maintain that these revolutionary changes in social and family relationships would not obliterate the "local judgment" (A.J.S. 11a) of New York and other states.

B. The District Court's ruling that existing New York's procedures do not protect the best interests of the child

Even accepting, *arguendo*, the District Court's holding that a child has a constitutionally protected liberty interest in his relationship to particular foster parents, that court erred in determining "the nature of the process that is due." *Morrissey v. Brewer*, *supra*, at 484. This Court has established that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) and that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, *supra*, at 481.

The District Court ordered the defendant social services officials to conduct a hearing in every case prior to authorizing the transfer of any foster child in the plaintiff class* from a foster home in which he has resided continuously for at least one year. At the hearing the natural parents, foster parents, child and agency may all present information to the administrative decision-maker. In addition, the child is to be represented by a disinterested adult whenever in the judgment of the agency the child's age, sophistication and ability to communicate his own feelings warrant it. These hearings are to be *automatic*, with no request for such a hearing from any participant required. The District Court's order thus exceeds any due process scheme ever mandated by this Court.

The District Court's rejection of New York's present legislative scheme as inadequate under due process standards is particularly surprising in view of the extensive and continuing legislative and judicial scrutiny given to the

* The District Court allowed an exception in emergency situations and in cases where the removal occurs pursuant to court order or is initiated by the foster parents. See A.J.S. 37a.

best interests of the child in the New York foster care system. As described *supra*, New York has an intricate and indeed evolving scheme of safeguarding the interests of all participants in its foster care system. That scheme *inter alia* provides foster parents with an informal conference prior to removal at which they can present reasons why the child should remain in their home, 18 N.Y.C.R.R. § 450.10, and allows a full fair hearing to the foster parents after removal. N.Y. Soc. Serv. Law § 400. After 18 months of foster care, a child comes under the jurisdiction of the New York Family Court, and the foster parents can invoke that jurisdiction at any time, including immediately prior to the child's removal, to obtain a foster care review proceeding before that court. N.Y. Soc. Serv. Law § 392. At this hearing, the court may direct the continuation of foster care, the return of the child to his natural parents, the institution of a proceeding to free the child for adoption, or the placement of the child for adoption with the foster parents or another family. The sole criterion for the decision is "the best interest of the child". N.Y. Soc. Serv. Law § 392(7).*

The District Court majority, however, was dissatisfied with this hearing and review provision. Expressing, as the dissent noted, a "social policy preference for a one year rather than the present statutory . . . period" (A.J.S. 30a), it required that an administrative hearing be available after twelve months despite the full *judicial* hearing

* It should be noted that the § 392 hearing permits a Family Court judge to weigh the natural parents' fulfillment of the obligations of parenthood which continue during foster care. A parent's failure to maintain substantial affectionate contacts with his child while in foster care may be the basis for a proceeding to terminate the natural parent's rights. The statute specifies that a visit by a parent "which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact." N.Y. Soc. Serv. Law § 384-b(7)(b). The full text of this provision is set out at p. 8 *supra*.

now available at eighteen months.* This preference has no basis in logic or in the record. None of plaintiffs' witnesses testified that one year was a particular turning point in foster care. Indeed, counsel for plaintiffs conceded that the one year duration did not mean that the natural parents had abandoned or ceased to love their children. (Tr. 172). Further, even when a parental request for return of a child is made before one year of foster care has passed, the child might not be removed from foster care until after the expiration of the year. (A. 308a). Nor does the agreement signed by parents when they place children in voluntary care state that the parents' rights will diminish after one year.

The only pertinent testimony concerning the one year foster care relationship was that of Dr. Fanshel, who stated after a longitudinal study of hundreds of foster children that the one year period has no significance in assessing the effect of transfers from foster homes. (A. 177a).

Further, the majority below held that § 392 was inadequate because it could not be invoked by the child, but only by the foster parents. The court rested this judgment upon its previous finding that there was a potential conflict of interest in this case between the foster children and the foster parents which required the appointment of separate counsel. (A.J.S. 14a). However, such a conflict

* At trial appellee Goldberg described the Rafael Serrano § 392 proceeding as follows:

"Q. Were you present at the 392 hearing? A. Yes.

Q. And were you permitted to speak and offer what position you wanted to offer? A. Yes.

Q. And were you apprised prior to the 392 hearing that such a hearing would be held? A. Were we apprised that there would be a hearing?

Q. That's right. A. Yes.

Q. Was there a disposition made by the judge, if you know, at the 392 hearing? A. He said foster care [should] continue." (A. 299a).

would exist only with respect to *determining* the rights of foster parents and foster children, not with respect to the *exercise* of the children's rights. If the foster parent wants the child to remain in his home, then he will act on the child's behalf and exercise the child's right to a prior hearing. If he does not, the child could not happily remain in the household. Since there is no conflict of interest between foster parent and foster child if both want the child to remain, the court's rationale for rejecting the procedures embodied in § 392 wholly lacks a logical foundation. Indeed, it actually contradicts the court's interest in the "continuity" of the foster care relationship, since such continuity depends on mutual consent between foster parent and child.

In view of the substantial identity of interest between foster children and foster care agencies (public and private), the small likelihood of an ill-conceived or improper removal or transfer under existing provisions, the minimal value of an additional administrative hearing and the substantial fiscal and administrative burden of conducting such a hearing automatically before every removal or transfer, this Court should decline to hold that the Constitution mandates the procedures required by the majority below. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

New York's evolving law concerning the rights of children in foster care, set out at pp. 3-9 above, more than meets constitutional requirements. It is a creative and balanced approach which is far more likely to guarantee permanence in a child's life, through reunion with his family or adoption, than is the attenuation of temporary foster care.

CONCLUSION

The decision below should be reversed and the complaint dismissed.

Dated: New York, New York, December 17, 1976.

Respectfully submitted,

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